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Thanaletchimy a/p Batamallai v Vijaya Kumar a/l Kassinathan

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(A)-767–04 OF 2015
DAVID WONG, UMI KALTHUM AND HASNAH HASHIM JJCA
26 APRIL 2018

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Family Law — Custody — Child — Child forcibly taken from mother — Application by mother seeking care, custody and control of child — Child staying with paternal grandmother — Whether mother unfit to care for child — Whether care, custody and control of child should go to mother — Law Reform (Divorce and Marriage) Act 1976 s 88(3)

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The appellant ('the plaintiff') and the respondent ('the defendant') were married in 2013 and bestowed with a son. According to the plaintiff: (a) the defendant was aggressive towards the plaintiff throughout the marriage and the tension deteriorated when the plaintiff was pregnant with their child; and

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(b) she was in constant fear of harassment and violence and was left with no other choice but to move out from their matrimonial home with their child who was ten months old. One day, the defendant came to plaintiff's parents' house and took the child away. The plaintiff was denied access to see her child. The child was born with some birth defects and had undergone two operations.

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The plaintiff submitted that due to his specific condition, the child needed special care and attention. The plaintiff commenced an action at the High Court, seeking for the care, custody and control of the child. Dismissing the plaintiff's originating summons, the High Court judge held, inter alia, that the child was under the care and custody of the defendant's mother since his birth

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and was under the care and custody of the plaintiff for a short period of time only. It was further decided that the care and custody of the child should remain with the child's paternal grandmother due to the fact that the child had been separated from the plaintiff for quite some time. Hence the present appeal.

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Held, allowing the appeal:

(1) The care and custody of a child below the age of seven years old would naturally incline to the mother unless the presumption under s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 is rebutted. Other

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than mere unsubstantiated allegations by the defendant against the plaintiff, there was no evidence to suggest that the plaintiff was unfit mother to her child. In fact, the child was under the plaintiff's care and custody for only approximately 22 days when the defendant forcibly took the child away from the plaintiff. She was denied access to the child by the

defendant and his family. The High Court judge had erred when he decided that it was best to preserve the status quo and not to disrupt the environment that the child was accustomed to, which was with the defendant's mother (see paras 30–33).

(2) The care and custody of the child should be given to the plaintiff. Who better to care for a child with special needs other than the child's biological mother. Due to the age of the child, who was only two years and ten months old at the time of the filing of this appeal and his medical condition, the plaintiff was the best caregiver for the child. The fact that the child was well taken care of by the paternal grandmother did not lessen the plaintiff's claim for the care and custody of the child (see paras 34–36).

(3) The care, custody and control of the child was given to the plaintiff. The defendant and/or his family members who have physical care, custody and control of the child was to produce and hand over the child to the custody of the plaintiff. An injunction was ordered to prevent the defendant, either personally or by the defendant's family members and/or representatives to take the child out of Malaysia. The defendant's visitation rights were allowed (see paras 37–38).

[Bahasa Malaysia summary

Perayu ('plaintif') dan responden ('defendan') berkahwin pada 2013 dan dikurniakan seorang anak lelaki. Menurut plaintif: (a) defendan agresif terhadapnya sepanjang perkahwinan mereka dan ketegangan ini bertambah teruk apabila plaintif mengandungkan anak mereka; and (b) dia sentiasa dalam ketakutan akan serangan dan keganasan dan tiada pilihan lain melainkan keluar dari rumah kelamin mereka dengan anak mereka yang berumur sepuluh bulan. Satu hari, defendan telah ke rumah ibu bapa plaintif dan membawa anak tersebut keluar. Plaintif dinafikan akses melihat anaknya. Anak tersebut lahir dengan kecacatan dan telah melalui dua pembedahan. Plaintif menghujahkan bahawa akibat keadaan spesifiknya, anak tersebut memerlukan jagaan dan perhatian khas. Plaintif memulakan satu tindakan di Mahkamah Tinggi, memohon penjagaan, jagaan dan kawalan anak tersebut. Menolak saman pemula plaintif, hakim Mahkamah Tinggi memutuskan, antara lain, anak tersebut berada bawah penjagaan dan jagaan ibu defendan sejak lahir dan berada di bawah penjagaan dan jagaan plaintif bagi tempoh masa sekejap sahaja. Diputuskan selanjutnya bahawa jagaan dan kawalan anak tersebut harus kekal dengan nenek sebelah bapa anak tersebut kerana anak tersebut terpisah daripada plaintif buat beberapa lama. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Penjagaan dan jagaan anak di bawah tujuh tahun biasanya berat pada ibu melainkan anggapan di bawah s 88(3) Akta Membaharui (Perkahwinan

dan Penceraian) 1976 disangkal. Selain dakwaan-dakwaan tidak berasas oleh defendan terhadap plaintif, tiada keterangan yang mencadangkan plaintif tidak sesuai menjadi ibu buat anaknya. Malah anak tersebut berada di bawah penjagaan dan jagaan plaintif selama kira-kira 22 hari semasa defendan merampas anak tersebut daripada plaintif. Plaintif dihalang akses anaknya oleh defendan dan keluarganya. Hakim Mahkamah Tinggi terkhilaf apabila beliau memutuskan bahawa ada terbaik untuk mengekalkan status quo dan tidak mengganggu persekitaran yang anak tersebut sudah terbiasa, iaitu dengan ibu defendan (lihat perenggan 30–33).

(2) Jagaan dan penjagaan anak tersebut harus diberi kepada plaintif. Siapa yang lebih baik menjaga anak dengan keperluan khas selain ibu kandung anak tersebut. Berdasarkan umur anak tersebut, yang baru berusia dua tahun dan sepuluh bulan semasa pemfailan rayuan ini dan keadaan perubatannya, plaintif adalah pengasuh terbaik anak tersebut. Fakta bahawa anak disebut dijaga dengan baik oleh nenek sebelah bapanya tidak mengurangkan tuntutan plaintif bagi penjagaan dan jagaan anak tersebut (lihat perenggan 34–36).

(3) Penjagaan, jagaan dan kawalan anak tersebut diberi kepada plaintif. Defendan dan/atau ahli keluarganya yang mempunyai penjagaan, jagaan dan kawalan fizikal atas anak tersebut dikehendaki mengembalikan dan mengemukakan anak tersebut dalam jagaan plaintif. Satu injunksi diperintah untuk menghalang defendan, baik dirinya mahupun ahli keluarganya dan/atau wakil-wakilnya, membawa keluar anak tersebut dari Malaysia. Hak defendan untuk melawat dibenarkan (lihat perenggan 37–38).]

Notes

For cases on custody in general, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4042–4069.

Cases referred to

L v S [2002] 7 MLJ 584; [2002] 6 CLJ 106, HC (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 88, 88(3), 90

Appeal from: Originating Summons No 24F-108–07 of 2015 (High Court, Shah Alam)

Ranjan Chandran (Sazarina Said with him) (Ramesh Yum & Co) for the appellant.
Ghazali Nik Taib (Noor Jihan Ghazali & Co) for the respondent.

Umi Kalthum JCA:

INTRODUCTION

[1] This was an appeal by the appellant/plaintiff against the decision of the learned High Court judge in dismissing the appellant's/plaintiff's originating summons dated 28 July 2015.

[2] The appellant's/plaintiff's originating summons amongst others sought for the care, custody and control of a child named Arjun Kumar a/l Vijaya Kumar to be given to the appellant's/plaintiff's on an immediate basis.

[3] The learned High Court judge had dismissed the appellant's/plaintiff's originating summons on 7 March 2016 and had ordered the status quo in respect of the care, custody and control of Arjun Kumar a/l Vijaya Kumar to be maintained that is, with the respondent's/defendant's mother.

[4] Aggrieved with the decision of the High Court, the appellant/plaintiff appealed to this court.

[5] For the purpose of this appeal, parties will be referred to as they were in the High Court.

BACKGROUND FACTS

[6] The plaintiff and the defendant got married on 29 April 2013 at the Sri Sundararaja Perumal Temple in Klang, Selangor Darul Ehsan. It was an arranged marriage. Throughout the marriage, both of them stayed at their matrimonial home at No 52, Lorong Gelang 5, Bandar Puteri, 41200 Klang, Selangor Darul Ehsan. As a result of this union, they were blessed with a son named Arjun Kumar a/l Vijaya Kumar (the child), who was born on 3 April 2014.

[7] The plaintiff and the defendant were constantly arguing with one another and the relationship between the two of them could be described as strained and acrimonious.

[8] The plaintiff alleged that the defendant had shown aggressive behaviour towards the plaintiff throughout their marriage. In addition to that, the plaintiff also alleged that the defendant had been verbally and physically abusive towards her.

[9] The tension in their marriage deteriorated further when the plaintiff was pregnant with their child. The plaintiff's wishes to meet her parents were

A denied by the defendant. The plaintiff alleged that in addition to being threatened by the defendant, the defendant also verbally and physically assaulted the plaintiff.

B **[10]** The plaintiff allegedly was always in a constant state of fear of harassment and violence from the defendant. Due to the constant abuse (verbal and physical), the plaintiff had lodged numerous police reports and when the abuse became even more rampant, the plaintiff was left with no other choice but to move out from their matrimonial home on 13 March 2015 to her parents' house at 8-1B, Jalan Industri, Pusat Bandar Puchong, Selangor Darul Ehsan with their child, then aged ten months old in 2015.

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[11] Then, on 3 April 2015, at or around 8.30am, the defendant with two men came to the plaintiff's parents' house and took the child away from the D plaintiff.

[12] The plaintiff had since then been denied access to see her child. Her attempt to take the child back at the defendant's parents' place on 7 April 2015 was prevented by the defendant.

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[13] The child was born with an anorectal defect or anorectal colostomy which is a birth defect in which the anus and rectum (the lower part of the digestive tract) is not properly developed.

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[14] The child had undergone a colostomy operation on 4 April 2014, a day after he was born, and a second operation when the child was four months old.

[15] At the time of the filing of this appeal, the child's age was two years and G ten months old. Due to his specific condition, the child needed special care and attention.

[16] The defendant vehemently denied the plaintiff's allegation of his aggressive behaviour and violent tendencies towards the plaintiff. The H defendant alleged that the reasons for the tension in their marriage was attributed to the fact that the plaintiff was not a practising Hindu and the plaintiff had failed to perform her responsibilities as a wife.

[17] In addition to that, the defendant also alleged that the difference in I caste between the plaintiff and the defendant also contributed to the problem in their marriage.

[18] The defendant contended that the custody, care and control of the child should remain with him and his mother as the child was already under her care

even while the plaintiff and the defendant were still living together. The child then was under the care of the defendant's mother.

AT THE HIGH COURT

[19] The learned High Court judge had dismissed the plaintiff's originating summons on 7 March 2016 and had ordered as follows:

(a) status quo of the right to the care, custody and control of the child be maintained, (that is with the defendant's mother);

(b) the plaintiff is granted the right of access to and to be with the child on a Sunday, for a period of three hours, once every two weeks, at a location to be determined by the plaintiff with the agreement of the defendant. The location must not be at either the plaintiff's house or the defendant's house. It must be at an appropriate location suitable for the child. The visit must be supervised by either the defendant or the defendant's mother; and

(c) there was no order as to costs.

[20] The learned High Court judge made a specific finding that the child was under the care and custody of the defendant's mother since his birth. The learned High Court judge found that the child was under the care and custody of the plaintiff for only a short period of time, that is, from the time plaintiff left her matrimonial home and went to stay with her parents on 13 March–3 April 2015 when the defendant took the child away from the plaintiff, which was approximately 22 days.

[21] The learned High Court judge also acknowledged the medical condition of the child who requires specific care and attention from his guardian. The learned High Court judge made a finding that the said child's welfare had been taken care of satisfactorily by the defendant's mother. There was no evidence adduced by the plaintiff to suggest that the welfare of the child was neglected under the care and custody of the defendant's mother, that is, the grandmother of the child.

[22] The learned High Court judge found that it was best to maintain the status quo of the care and custody of the said child so as not to disrupt the child's upbringing by transferring the care and custody to the plaintiff.

[23] Furthermore, the learned High Court judge was also of the opinion that the care and custody of the child should remain with the child's paternal grandmother due to the fact that the child had already been separated from the plaintiff for quite some time.

A THE APPEAL

[24] The plaintiff's appeal was premised mainly on the ground that the learned High Court judge had erred when he decided that the care and custody of the child should remain with the defendant's mother just because the B defendant's mother had been taking care of the child since his birth.

[25] The plaintiff also contended that the learned High Court judge had erred in fact and in law when he denied the plaintiff's right as the biological mother to the care, custody and control of her child of tender years. C

[26] The plaintiff contended that the learned High Court judge had misdirected himself in law, when he had erred in interpreting ss 88 and 90 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') and had caused D serious injustice to the plaintiff.

DECISION OF THE COURT

[27] Section 88 of the LRA provides as follows: E

> 88 Power for court to make order for custody
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> (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of F which include child welfare or to any other suitable person.
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> (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard —
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> G (a) to the wishes of the parents of the child;
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> (b) to the wishes of the child, where he or she is of an age to express an independent opinion.
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> (3) *There shall be a rebuttable presumption that it is for the good of a child below* H *the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.*
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> (4) Where there are two or more children of a marriage, the court shall not be I bound to place both or all in the custody of the same person but shall consider the welfare of each independently. (Emphasis added.)

[28] The position of the law on the power of thecourt to make an order for custody of children below the age of seven years old is clearly provided under

s 88(3) of the LRA. The law presumes (albeit rebuttable presumption) that it is in the best interest of the child aged seven years and below to be under the care and custody of the mother unless it can be proven to the court that the child would be better off with someone else.

[29] The rationale behind this presumption has been elucidated in numerous cases. Reference is made to the case of *L v S* [2002] 7 MLJ 584; [2002] 6 CLJ 106 where Justice Clement Skinner HCJ (as he then was), explained the rationale behind the presumption under s 88(3) of the LRA, at p 593 (MLJ); p 115 (CLJ), as follows:

> The rationale behind this presumption has been explained in a number of cases. It is that this period ie, a child reaches seven years of age, is a period of nurture when a young child is dependent on the mother for its physical and emotional needs. Thus, in *K Shanta Kumari v Vijavan* [1986] 2 MLJ 216 at p 218, Wan Yahya J (as he then was) said:
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> > Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else.
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> And in *Re Orr* [1973] 2 DLR 77 Muloch CJ said:
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> > In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father ...
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> And in *W v H* [1987] 2 MLJ 235 Shankar J (as he then was) in deciding that custody of a newborn baby should be given to its mother said at p 242:
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> > I would state it as a categoric opinion of this court that in such a situation an overwhelming case would have to be shown before a newborn baby should be deprived of the society of its mother. It would be unwise to try and catalogue the circumstances before such an order would be made, but I would venture to suggest that the applicant in such cases would have to come close to proving that the health or welfare of the infant would be put at serious risk if it is left with the mother.
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> Thus, even though the presumption is a rebuttable one, Shankar J in *W v H* was of the opinion that strong grounds would be needed to rebut the presumption ...

[30] We were of the view that the care and custody of a child below the age of seven years old would naturally incline to the mother unless the presumption under s 88(3) of the LRA is rebutted. Strong grounds are needed to rebut this presumption. In short, prima facie the care and custody of a child of the tender

age should remain with the mother and strong grounds are required to justify depriving the mother of such care and custody.

[31] In this present appeal, other than mere unsubstantiated allegations by the defendant against the plaintiff, there was no evidence to suggest that the plaintiff was an unfit mother to her child.

[32] In fact, from the facts of the case, we found that the plaintiff, after deciding that she had had enough of the verbal and physical abuse from the defendant, chose to leave their matrimonial home together with the child when the child was ten months old. The child was under the plaintiff's care and custody for only approximately 22 days when the defendant together with his two relatives took the child forcibly away from the plaintiff. Thereafter, the plaintiff was denied access to the child by the defendant/defendant's family. Thus, we were of the view that the learned High Court judge had erred when he premised his decision on granting the care and custody of the child's grandmother just because the plaintiff only had cared for the child for a short period of time, that is, between the time when she left the matrimonial home until the time when the defendant took the child from the plaintiff. The learned judge failed to consider in the proper context the reasons why the plaintiff had a short period of time to look after the child and had instead 'rewarded' the defendant for his forcible custody of the child from the plaintiff and denial of the plaintiff's access to the child.

[33] Thus, we found that the learned High Court judge had erred when he decided that it was best to preserve the status quo and not to disrupt the environment that the child was accustomed to, that is, with the defendant's mother, as this finding was misconceived. This finding would seem to connote the idea that the plaintiff had voluntarily abandoned the child only to come back and demand the care and custody of the child later whilst in fact she was denied the opportunity to not only care for her own child but also not given any form of access to the child by the defendant/defendant's family.

[34] The fact that the child is suffering from a serious birth defect and requires special care and attention cannot negate the right of the plaintiff to care for her own child. What was more disturbing to us was the fact that the learned judge gave the care and custody of the child to his grandmother and not even to his father. We found that the care and custody of the child should be given to the plaintiff. Who is better to care for a child with special needs other than the child's biological mother?

[35] Thus, since the rebuttable presumption under s 88(3) of the LRA had not been proven by the defendant, it was our decision that the plaintiff, being the biological mother, be given the care and custody of the child.

[36] Due to the age of the child, who was only two years and ten months old at the time of the filing of this appeal, and the medical condition of the child, we were of the view that the plaintiff is the best caregiver for the child. The fact that the child was well taken care of by the paternal grandmother did not lessen the claim of the plaintiff for the care and custody of the child. A grandmother's right, if any, does not supersede a biological mother's rights over a child in the circumstances.

CONCLUSION

[37] For the reasons stated above, we unanimously allowed the appeal with no order as to costs. We therefore set aside the order of the High Court dated 7 March 2016. We allowed prayers (i), (ii) and (iii) of the plaintiff's originating summons dated 28 July 2015 as follows:

(i) that the care, custody and control of the child named Arjun Kumar s/o Vijaya Kumar be given to the plaintiff immediately;

(ii) that the defendant and/or the defendant's family members and/or the defendant's representatives who have the physical care, custody and control of the child named Arjun Kumar s/o Vijaya Kumar to produce and hand over the child to the custody of the plaintiff immediately upon being served a copy of the order of the court; and

(iii) an injunction to prevent the defendant either personally or by the defendant's family members and/or the defendant's representatives to take the child named Arjun Kumar s/o Vijaya Kumar out of Malaysia whether without any conditions imposed or subject to any conditions being imposed by the court as it deems fit and proper.

[38] We further allowed the defendant visitation rights to the child on every Saturday between the hours of 9am until 6pm whereby the defendant is required to collect the child from and return the child to the plaintiff's house.

Appeal allowed.

Reported by Afiq Mohamad Noor